

JACK JONES)	
Claimant)	
VS.)	
)	
KIRK MAYER, INC.)	Docket No. 177,058
Respondent)	
AND)	
)	
CNA INSURANCE COMPANY)	
Insurance Carrier)	

- (1) Whether claimant suffered an accidental injury to his right shoulder that arose out of and in the course of his employment with respondent.
- (2) Whether respondent should be responsible for payment of medical expenses and/or temporary total disability compensation for an injury to claimant's right shoulder.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the preliminary hearing record and considering the brief of the respondent, the Appeals Board finds as follows:

Whether claimant suffered a work-related injury is a jurisdictional issue that subjects a preliminary hearing order to Appeals Board review. See K.S.A. 44-534a, as amended.

(1)(2) Claimant alleged he injured his right upper extremity and right shoulder while employed by the respondent from February 1992 through August 20, 1992. During that period, claimant was employed by the respondent and was assigned to work as a research and development mechanic at Learjet in Wichita, Kansas. Claimant testified his right elbow, right tricep muscle, and right shoulder became symptomatic while performing his regular work activities at Learjet. Those work activities required him to repetitively operate vibratory tools and to perform work overhead. The respondent does not dispute that claimant sustained a work-related injury to his right elbow and tricep but denies that claimant's right shoulder was injured while employed by the respondent.

The parties stipulated at the July 15, 1997, preliminary hearing, that the record of evidence should also include the transcript and exhibits admitted at a hearing held before Administrative Law Judge Shannon S. Krysl on September 2, 1993, in regard to a motion filed by the claimant requesting medical treatment for an alleged right shoulder injury.

Claimant testified he first noticed pain in his right upper extremity and right shoulder in February 1992, while working for the respondent at Learjet. The symptoms in the right upper extremity worsened to the point that he notified the respondent of the injury on August 20, 1992. The respondent sent claimant for medical treatment on August 20, 1992, to the St. Joseph Minor Emergency Center (MEC) in Wichita, Kansas.

Claimant was treated at MEC by some five different physicians. He was eventually referred to Paul D. Lesko, M.D., an orthopedic surgeon, who first saw claimant on October 8, 1992. Dr. Lesko diagnosed synovitis, elbow and triceps tendonitis. Claimant received conservative care from Dr. Lesko until March 18, 1993, when Dr. Lesko released claimant to return to work with permanent restrictions. Claimant was taken off work because of the injury and never returned to work for the respondent because he was laid off.

The medical treatment records from MEC and Dr. Lesko do not contain any complaints from the claimant concerning right shoulder problems until August 20, 1993. Dr. Lesko's medical note dated August 20, 1993, indicates claimant complained of discomfort in his right upper extremity and also made complaints for the first time of right shoulder discomfort. At that time, claimant had not worked or received any medical treatment since Dr. Lesko released him on March 18, 1993. After examining the claimant,

Dr. Lesko diagnosed right tricep strain with some ulnar nerve symptoms and mild bursitis of the right shoulder.

Following claimant's visit to Dr. Lesko on August 20, 1993, claimant filed a motion requesting medical treatment for the right shoulder injury. At the time the motion was filed, the claimant was undergoing a vocational rehabilitation assessment as provided for in K.S.A. 1992 Supp. 44-510g. The hearing was held on the motion before Administrative Law Judge Krysl on September 2, 1993. As previously noted, that hearing transcript is part of the record of this preliminary hearing. As a result of that hearing, the Administrative Law Judge ordered claimant to undergo an independent medical examination by orthopedic surgeon James L. Gluck, M.D., for the purpose of determining the diagnosis, etiology, and restrictions for claimant's alleged right shoulder injury.

Dr. Gluck examined the claimant and issued an independent medical examination report to Judge Krysl on November 1, 1993. Dr. Gluck diagnosed claimant's right shoulder injury as subacromial crepitation, mildly symptomatic. Dr. Gluck did not address the issue of the etiology of claimant's right shoulder problem.

Following the September 2, 1993, motion hearing, the claimant received additional treatment for his right upper extremity injury. Dr. Lesko, on December 27, 1995, performed a subcutaneous transposition of the right ulnar nerve.

From 1994 to May 1996, claimant participated in a vocational rehabilitation program to retrain him for another occupation. Claimant attended a junior college and was trained for a nondestructive testing and inspection occupation in the aircraft industry. Following the training, claimant obtained a job for approximately two months at Raytheon Aircraft Company in Wichita and then started working for Cessna on October 28, 1996. Claimant was employed at Cessna on the date of the preliminary hearing, July 15, 1997. Claimant testified his jobs at both Raytheon and Cessna were repetitive but relatively light. He testified, that on average, he worked only with parts weighing approximately 5 to 10 pounds while performing his job duties at Cessna. Claimant testified that the work at Cessna was easy work.

Claimant testified he had not had problems with either his right arm or his right shoulder before working for the respondent. Claimant also testified that regardless of what he was doing he had good days and bad days as a result of his injured right arm and shoulder. In addition, claimant testified following his right arm surgery his right shoulder became more symptomatic. The claimant attributed the increased symptoms to the heavy cast applied to his right arm. However, there is no medical evidence to substantiate this assertion.

Claimant returned to see Dr. Gluck on August 21, 1996, complaining of discomfort in his right upper extremity and also his right shoulder. Claimant returned to see Dr. Gluck instead of Dr. Lesko because Dr. Lesko was no longer practicing in Wichita, Kansas.

Respondent authorized additional treatment with Dr. Gluck for claimant's right upper extremity but refused to authorize treatment for claimant's right shoulder. Dr. Gluck treated claimant's right shoulder injury and claimant paid for the treatment out of his own pocket. Dr. Gluck provided conservative treatment for both claimant's right upper extremity and his right shoulder injuries. However, because the pain and discomfort continued, Dr. Gluck, on March 19, 1997, recommended surgery for both injuries.

As previously indicated, Dr. Gluck failed to express an opinion as to the etiology of claimant's right shoulder problem in his November 1, 1993, independent medical evaluation. However, after claimant returned for further treatment on August 21, 1996, Dr. Gluck's medical records admitted into evidence at the preliminary hearing contain various opinions expressed by Dr. Gluck on the etiology of claimant's right shoulder problems. In a letter dated September 4, 1996, to respondent's attorney, Dr. Gluck opined that claimant's right shoulder problem was not related to his work while employed by the respondent. Dr. Gluck's medical note of October 21, 1996, however, states he does feel claimant's right shoulder impairment is related to his previous employment. Dr. Gluck's medical note dated February 19, 1997, states that claimant's right shoulder symptoms worsened prior to his present job at Cessna and there is some relationship between his work at Kirk Mayer, Inc. and his right shoulder problem. Finally, in a letter to claimant's attorney dated May 8, 1997, Dr. Gluck expressed the following opinion:

"I still feel that the apportionment of blame to the shoulder pathology on Kirk-Mayer is 25% or less. I think the majority of the cause to the right shoulder pathology is problems preceding his work at Kirk-Mayer and then subsequent to his work at Kirk-Mayer."

Dr. Gluck also indicated that claimant had given a history of right shoulder problems dating back to 1982. Claimant, however, testified his first right shoulder symptoms did not start until 1992 while working for the respondent.

The Administrative Law Judge found claimant had presented evidence at the preliminary hearing that proved his right shoulder injury occurred while working for the respondent. The Administrative Law Judge authorized Dr. Gluck to provide medical treatment, including surgery, for claimant's right shoulder and right elbow injuries. The respondent argued that claimant had failed to prove his right shoulder injury occurred while performing his work activities for the respondent. The respondent points out that claimant did not make any complaints in regard to right shoulder pain or discomfort until almost one year from the time he reported his right elbow injury. Respondent argues that claimant injured his right shoulder following his employment with the respondent while at home or while working for his present employer, Cessna. Additionally, respondent argues that the medical evidence supports the conclusion that claimant's right shoulder injury occurred following his employment with the respondent.

The Appeals Board agrees with the respondent's argument and finds the preliminary hearing record at this juncture of the proceeding fails to prove that claimant's right shoulder injury has a causal connection to his work activities while employed by the respondent. Specifically, the Appeals Board finds that Dr. Gluck's opinion in his letter to claimant's attorney dated May 8, 1997, is persuasive that claimant's current right shoulder problem is associated with either work activities or non-work activities following claimant's employment with the respondent. Therefore, the Appeals Board concludes that the preliminary hearing Order of Administrative Law Judge Nelsonna Potts Barnes is reversed and medical treatment, including surgery, is not authorized for claimant's right shoulder injury.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes, dated July 15, 1997, is reversed and the claimant is denied medical treatment for his right shoulder injury.

IT IS SO ORDERED.

Dated this ____ day of October 1997.

BOARD MEMBER

c: Andrew E. Busch, Wichita, KS
Rex W. Henoch, Lenexa, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director